UNITED
NATIONS

AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 496

Case No. 506: Mr. B

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Ahmed Osman, Vice-President, presiding; Mr. Samar Sen; Mr. Ioan Voicu;

Whereas, at the request of Mr. B, a former staff member of the United Nations University, hereinafter referred to as UNU, the President of the Tribunal, with the agreement of the Respondent, extended to 14 April 1989, the time-limit for the filing of an application to the Tribunal;

Whereas, on 31 March 1989, the Applicant filed an application, containing pleas which read in part as follows:

"PLEAS

7. The Applicant respectfully requests the Tribunal to take the following preliminary and provisional measures and decisions:

(1) To declare the present appeal receivable;
(2) To declare itself competent in the present dispute;
(3)To order the case be remanded for institution of the investigation the Panel on Discrimination and other Grievances at U.N. Headquarters intended to undertake but was prevented from doing so by the Rector of the UNU [United Nations University], and to order payment of compensation in the sum of three months net base salary to the Applicant for the procedural delay incurred (...);

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(4)To grant (...) in view of the complexity of the case and inevitable incompleteness of the written evidence submitted - oral proceedings (...), and allow statements to be taken;
(5) To request that the Respondent reply to the questions set by the Applicant in the attached questionnaire (...) relating to the present case and provide evidence to the statements made therein, as well as submit the record of the formal conversation held between the Applicant and the Rector of the UNU in early September 1986;
(6) To request an oral (...) or written statement from the Senior Programme Officer of the Global Learning Division of the United Nations University to attest the treatment the Applicant received from his former direct supervisor; and
(7) To grant a hearing to the Co-ordinator of the former sixth UNU Staff Council (...) and, as may be deemed pertinent, other duly authorized representatives of the staff representative body of the United Nations University.

8. The Applicant further respectfully requests the Administrative Tribunal:
...
(c) To adjudge and declare, the UNU's administrative decision of 5 June 1987 not to renew the Applicant's contract beyond 31 December 1987 null and void thereby rescinding it; and
(d) To order the Respondent to restore the status quo ante by reinstating the Applicant in his former position at the UNU and by retroactively paying the salary emoluments and staff benefits accrued since 29 January 1988; should the Secretary-General decide, under article 9, para. 1 of the Tribunal's Statute not to take further action on the finding by the Tribunal that the Applicant's request is well founded, to order instead a compensation payment of two years net base salary.

9. In addition the Applicant requests the Tribunal:
...
(d) To order that (i) compensation in the amount of two years net base salary be paid to the Applicant, that (ii) a letter of apology be offered by the Respondent to the Applicant for the distress and impairment caused, and that (iii) disciplinary measures be instituted against the responsible officers in the UNU Administration for their negligence in not taking any corrective measures to put an end to the unfair treatment given to the Applicant (...).

10. Further, the Applicant requests the Tribunal:
...

(c) To adjudge and declare that the Panel on Discrimination and other Grievances at U.N. Headquarters has jurisdiction to deal with cases originating from the UNU, and therefore, that the rejection by the Rector of the UNU, as expressed in his letter of 23 December 1987 to the Secretary of the Panel, is null and void; and
(d) To order the Secretary-General to (i) institute the investigation requested by the Panel, to (ii) implement the Panel's request made in accordance with the powers accorded to it in ST/AI/308/Rev.1 by extending retroactively the Applicant's fixed-term contract for two months, (should the Tribunal decide in its stead to conduct its own investigation, the Tribunal is requested to order the payment of two months gross-base salary (i.e. including staff benefits as the original request for extension would have provided for)), to (iii) pay compensation of three months net-base salary for the loss caused by the procedural delay involving the remand of the case for institution of the aforementioned investigation, and to (iv) make effective the jurisdiction of the Panel to deal with cases from the UNU.

...

12. Further, the Applicant requests the Tribunal:

...

(c) To declare and adjudge that, besides the letter of 23 December 1987 from the Rector to the Co-ordinator of the Panel being null and void, the statements found in the latter constitute (i) a discrimination towards the Applicant, and (ii) a grave abuse of authority in that the Rector appropriated the Panel's prerogatives; and
(d) To order the Respondent to (i) offer an apology to the Applicant, and (ii) to pay compensation of two months net-base salary for the distress and embarrassment caused by the act of discrimination in question.

13. Further, the Applicant requests the Tribunal:

6. (a) To affirm that (i) the memorandum of 28 December 1986 from the Applicant's former direct supervisor to the Chief of Personnel of the UNU is invalid and unwarranted in its entirety, that (ii) the way this document was handled did not reflect due process, and that (iii) the Rebuttal Panel's report does not constitute an adequate report;

...

(d) To order (i) the removal of the memorandum in question and all other related documents from the Applicant's official status file, (ii) the insertion in the same file of a statement attesting to the professional capacity and moral integrity of the

Applicant including an explicit mention of his suitability for employment within the U.N. system, (iii) the issuance of an apology, and (iv) the payment of compensation amounting to three months net-base salary for the embarrassment and distress caused by both the memorandum and the way it was handled by the UNU Administration.

14. Further, the Applicant requests the Tribunal:

7. (a) To affirm that both the Joint Appeals Board [JAB] and the Secretary-General failed to deal adequately with the request for suspension of administrative action that the Applicant filed before the JAB on 25 November 1987 pursuant to Staff Rule 111.2(f);

...

(d) To order the Respondent (i) to assume and divulge the clarifications made by the Tribunal concerning the extent of the powers of the JAB under Staff Rule 111.2(f) to (ii) provide a clarification of the ground given for failing to give effect to the Applicant's request for stay of action and (iii) to procure the modifications of the above rule so as to make the decision of the Secretary-General under such rule appealable when the grounds invoked for rejecting a request are spurious or irrelevant;

15. And, finally, the Applicant requests the Tribunal:

8. (a) To affirm that the JAB's report (...) on the appeal filed by the Applicant on 25 November 1987, fell far short of the thoroughness, non-biased presentation of the facts available to it, logic, and rigorous analysis expected from the Board;
(b) To find that the presentation of facts in the JAB's report section 'summary of the facts' is partial and biased against the Applicant ...;

...

16. The Applicant requests the Tribunal:

9. (a) To affirm that the Applicant is entitled to a certificate of service — without prejudice to the Applicant's plea for reinstatement — in accordance with Staff Rule 109.11;
(b) To find that neither (i) the UNU's Director of Administration's letter of 6 December 1988 (...) where it is indicated that the certificate will be provided 'in due time', nor (ii) the certificate of service of 13 March 1989 which does not contain any reference to the Applicant's quality of work and to his official conduct, comply with the request made by the Applicant (...) in accordance with Staff Rule 109.11 (...);

(c) To adjudge and declare the certificate of service (dated 13 March 1989) invalid; and
(d) To order the Respondent to issue a new certificate of service complying with the request made by the Applicant in accordance with Staff Rule 109.11."

Whereas the Respondent filed his answer on 27 June 1989;

Whereas, on 6 December 1989, the Applicant filed written observations, submitted a revised statement of his pleas and requested that his name not be used to identify his case;

Whereas, on 27 March 1990, the presiding member of the panel ruled that no oral proceedings would be held in the case;

Whereas, on 27 April 1990, the Applicant submitted an additional document and further observations;

Whereas, on 10 May 1990, the Tribunal requested the Respondent to provide the Tribunal with "the record of the formal conversation held between the Applicant and the Rector of the United Nations University in early September 1986" and on 11 May 1990, the Respondent informed the Tribunal that no such record existed;

Whereas, on 22 May 1990, the Applicant submitted his comments on the answer provided by the Respondent and an additional document;

Whereas, on 31 May 1990, the Executive Secretary of the Tribunal informed the parties that the Tribunal had decided to adjourn its consideration of the case until its next session to be held in New York in October 1990;

Whereas, on 2 August and 11 October 1990, the Applicant submitted additional documents and further observations;

Whereas, on 16 October 1990, the Tribunal put questions to the Respondent and on 19 October 1990, he provided answers thereto;

Whereas, on 27 October 1990, the Applicant submitted his comments on the answers provided by the Respondent and also filed additional documents;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 3 October 1983. He was initially offered a two year fixed-term appointment at the

P-3, Step I level, as a Programme Officer at the Global Learning Division (GLD) of the UNU in Tokyo, Japan.

In a confidential inter-office memorandum dated 18 May 1985, Mr. Edward Ploman, at the time Vice Rector of the University and also the Applicant's supervisor, recommended that the Applicant's appointment be extended for one year. In support of his recommendation, he evaluated the Applicant's work as "generally good"; the quantity of his work and the ability to meet schedules as "somewhat varying", and noted "certain difficulties" regarding his ability to work harmoniously with other colleagues. In a subsequent memorandum dated 4 June 1985, Mr. Ploman elaborated on his recommendation, stating that, although the Applicant had proved "to be conscientious and diligent in his work", he was "often quite meticulous which sometimes leads to difficulties in meeting deadlines"; and that although the Applicant showed "potential for career development", he still required "more experience in a professional work situation, particularly in respect of establishing more harmonious relations with other staff members". Mr. Ploman further stated that he had "indicated [to the Applicant] the need for him to choose between a continuation of his education (PhD studies) and continued professional work ...".

The Appointment and Promotion Board (APB) endorsed Mr. Ploman's recommendation and noted his wish that the Applicant's appointment be extended for one year only, although "he was of the view that Mr. [B] is a competent and effective s/m [staff member]". The Board also expressed its hope "that during the extension period the [Applicant] may be able to decide where his own future lies, i.e. working for UNU or returning to complete his studies". In a letter dated 24 June 1985, the Chief of Personnel informed the Applicant that the Rector had approved the Board's recommendation to extend his appointment for a further fixed term of one year, through 2 October 1986.

On 15 April 1986, the Chief of Personnel asked Mr. Ploman for his recommendation concerning the extension of the Applicant's appointment beyond 2 October 1986 and an evaluation of the Applicant's performance.

On 24 April 1986, Mr. Ploman recommended a further extension of one year, after a "careful review of relevant facts, in particular the needs of

the Division in the current situation as related to [Mr. B's] strengths and weaknesses, and taking into account the undesirability of changing staff (for organizational and financial reasons) at the present moment". He explained that he had held "extensive discussions" with the Applicant concerning his "work performance, the needs of the Division and [his] own future" and had "made clear to him that he cannot make a career at the UNU and that he therefore should prepare a plan for his future based on this consideration".

The APB endorsed Mr. Ploman's recommendation and noted that "if necessary, [Mr. B's] contract could be renewed until the end of the calendar year, i.e. December 1987, and the Board informed of such renewal, it being understood that this case could not be construed as having created a precedent". The Applicant was offered a new one year fixed-term appointment, scheduled to expire on 2 October 1987.

According to information provided by the Respondent, at the Tribunal's request, Mr. Ploman was absent from Headquarters from 16 September to 26 December 1986, on sick leave. He returned to Tokyo on 27 December 1986 and was scheduled to retire from UNU on 31 December 1986.

During his brief stay at Headquarters, on 28 December 1986, Mr. Ploman wrote to the Chief of Personnel, recommending that the Applicant's appointment should not be extended further. In support of his recommendation, Mr. Ploman stated that "at the last renewal of [Mr. B's] contract it was made clear to him, in several long conversations, that he could not count on permanent employment with the UNU to provide the financial basis for his studies in Japan and that his performance, while acceptable in certain respects, still showed serious errors of judgement and curious lacunae, neither being acceptable in a professional officer of his background and standing...". He asserted that during the last extension of the Applicant's appointment, the Applicant had "not given reason for a change in [his] overall evaluation...". This memorandum was not shown to the Applicant at the time.

On 20 March 1987, Dr. Cecil Blake, a Senior Programme Officer, GLD, asked the Chief of Personnel to submit the Applicant's case to the next APB meeting, noting that Mr. Ploman had informed him that "he had taken a

concrete decision" on the Applicant's contractual status and had informed the Chief of Personnel accordingly. On 13 May 1987, the Chief of Personnel, in accordance with the provisions of Personnel Circular 85/02, transmitted to the Applicant Mr. Ploman's recommendation of 28 December 1986 and asked him for his comments, to be submitted to the APB, which was scheduled to meet on 22 May 1987.

In a reply dated 19 May 1987, the Applicant informed the Chief of Personnel that he intended to rebut Mr. Ploman's memorandum of 28 December 1986, "on substantial and procedural grounds" and asked him not to discuss the matter of the extension of his contract at the forthcoming APB meeting. In a reply dated 20 May 1987, the Chief of Personnel assured the Applicant that Mr. Ploman's recommendation would not be submitted to the APB. The APB met on 22 May 1987, and confirmed its previous recommendation "including [the] extension [of the Applicant's appointment] up to 31 December 1987".

In a letter dated 5 June 1987, the Chief of Personnel informed the Applicant that his appointment would be extended from 3 October through 31 December 1987, and that he would be separated from the University with effect from 31 December 1987. On the same date, the Applicant instituted a rebuttal procedure, pursuant to Administrative Instruction ST/AI/240/Rev.2, against "Mr. Ploman's memorandum of 28 December 1986 regarding the extension of [his] contract".

On 4 July 1987, the Applicant requested the Rector to review the administrative decision conveyed to him on 5 June 1987, not to extend his appointment beyond 31 December 1987. On 3 August 1987, the Applicant requested the Secretary-General to review the same administrative decision.

On 27 August 1987, the Rector appointed a Rebuttal Panel to review the Applicant's rebuttal of Mr. Ploman's memorandum of 28 December 1986.

On 24 September 1987, the Applicant signed a new letter of appointment, through 31 December 1987, for a fixed-term period of two months and 29 days. The Applicant noted as a "Special Condition" that he "accepted [the contract] as an interim contract without prejudice to ongoing or future proceedings relating to the special report of 28 December 1986 and the administrative decision of 5 June 1987 ... and with the understanding that its acceptance does not imply [his] separation from UNU by the date the contract expires".

On 14 October 1987, the Assistant Secretary-General, Office of Human Resources Management (OHRM), informed the Applicant that the Secretary-General, having conducted administrative review of his case, was "not in a position to recommend any reconsideration of the Rector's decision as conveyed to [him]" on 5 June 1987. On 25 November 1987, the Applicant lodged an appeal with the Joint Appeals Board (JAB), requesting the Board, under Staff Rule 111.2(f), to recommend suspension of action on the administrative decision that was the subject of the appeal.

The Applicant was separated from the service of UNU on 31 December 1987, having previously filed a complaint with the Panel on Discrimination and Other Grievances at Headquarters, whose jurisdiction in the case was not accepted by the Rector.

On 3 January 1988, the Board adopted its report on the Applicant's appeal for suspension of action of the administrative decision. Its considerations, conclusions and recommendation read as follows:

> "Considerations, Conclusions and Recommendation
>
> 19. Having heard the statements made by both parties at the hearing, the Panel was unable to support the request for suspension of action under Staff Rule 111.2(f).
>
> 20. The Panel observed that the appeal was directed against the decision not to extend the appellant's fixed-term appointment beyond 31 December 1987 and that the appellant requested a stay of action on that decision.
>
> 21. The Panel recognized that a recommendation that the expiration of the appellant's contract be stayed necessarily implied that the appellant's fixed-term contract be renewed. This, the Panel agreed, was beyond its competence under Staff Rule 111.2(f). The Panel recognized also that the request for an extension of the appellant's contract, pending investigation of the case, fell outside the JAB's competence and would more properly be addressed to the Panel on Discrimination and Other Grievances, which can make a recommendation for such an extension for a maximum period of two months, under paragraph 15 of Administrative Instruction ST/AI/308/Rev.1. (...).
>
> 22. Accordingly, the Panel makes no recommendation in favour of the request for a stay of administrative action.

23. In this connection, having made a preliminary review of the facts set forth in the letter of appeal, the Panel wished to emphasize that its conclusion on the request for a stay of administrative action was without prejudice to any conclusion or recommendation the JAB might make at a later stage regarding the substance of the case."

The Rebuttal Panel, established by the Rector before the Applicant's separation from service under ST/AI/240/Rev.2, to consider the Applicant's rebuttal of Mr. Ploman's evaluation of 28 December 1986, submitted its report on 17 February 1988. Its conclusions read as follows:

"Conclusions

The panel regrets that a relatively simple communication problem has led to such confrontation. It also regrets that Mr. Ploman failed to communicate in writing his reservations concerning Mr. [B]'s performance and that Mr. Ploman's memorandum of 28 December 1986 was not communicated to Mr. [B] with due dispatch.

Nonetheless, we see nothing that could be gained by pursuing the matter any further. What transpired between the two employees concerned can never be recreated and therefore no final judgements can be made on the matter.

If we were to recommend a course of action in this case, we would suggest either (a) that all of the correspondence dealing with the case be placed on file or (b) that the University enter into direct discussions with Mr. [B] with a view to clearing his file of all adverse comment."

On 3 March 1988, the Under-Secretary-General for Administration and Management transmitted to the Applicant the JAB report on his request for suspension of action and informed him that:

"...

The Secretary-General has noted the Panel's report, which made no recommendation in support of your request, and the fact that, following the expiration of your fixed-term appointment on 31 December 1987, this request has become moot. The Secretary-General has therefore decided to take no action on your request.

..."

On 23 September 1988, the JAB adopted its report on the merits of the case. Its conclusions and recommendation read as follows:

> "Conclusions and recommendation
>
> 28. The Panel concludes that the appellant did not have a legal expectancy of renewal of his fixed-term appointment.
>
> 29. The Panel also concludes that the appellant had not produced sufficient material to sustain his charge that the contested decision was improperly motivated.
>
> 30. On the other hand, the Panel concludes that the UNU Administration, including the appellant's supervisor, failed to communicate properly over time with the appellant. In particular, it noted the delayed communication of the memorandum of 28 December 1986 from the appellant's supervisor, containing the recommendation not to renew the appellant's fixed-term appointment. For this reason, the Panel recommends that the appellant be given compensation in the amount of one month net base pay."

On 28 September 1988, the Officer-in-Charge, Department of Administration and Management, wrote to the Applicant as follows:

> "The Secretary-General, having re-examined your case in the light of the Board's report, has decided to maintain the contested decision of non-renewal of your fixed-term appointment. The Secretary-General has also, however, decided, in final settlement of your case, to accept the Board's unanimous recommendation to award you one month's net base salary in regard to the manner your situation was dealt with and to take no further action on the matter".

On 31 March 1989, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent's decision not to extend the Applicant's appointment has been vitiated by lack of due process.

2. The Respondent discriminated against the Applicant by not allowing the Panel on Discrimination and Other Grievances to undertake an investigation into the allegations of unfair treatment made by the Applicant.

3. The JAB's report is partial and biased against the Applicant.

4. The Applicant suffered injury because of unfair treatment in all the circumstances of the case.

Whereas the Respondent's principal contentions are:

1. The Applicant had neither the right nor the legal expectancy of continued employment with UNU beyond the expiry of his fixed-term appointment on 31 December 1987. His separation from UNU therefore did not violate his rights.

2. The decision not to renew the Applicant's fixed-term contract was not motivated by prejudice.

3. The appropriate procedures were observed and the Applicant has already been granted compensation for those claims considered by the JAB to be justified.

The Tribunal, having deliberated in Geneva from 7 to 9 May 1990 and in New York from 11 October to 8 November 1990, now pronounces the following judgement:

I. The Applicant appeals principally against the decision by the Rector of the United Nations University (UNU), not to renew his fixed-term appointment, the manner this non-renewal was effected and the unfair treatment to which he was subjected throughout his employment at UNU, and he raises a number of other related issues.

II. The Applicant has asked for oral hearings, for the production of testimony and additional documents as well as for the intervention by the UNU Staff Council. The Tribunal has requested the Respondent to produce documents it considered indispensable and additional information. The Tribunal does not deem that an oral hearing, intervention by the UNU Staff Council, or further production of testimony and documents are necessary.

III. The Tribunal will deal first with the Applicant's appeal against the administrative decision of 5 June 1987 by the Rector, not to renew his

fixed-term contract beyond 31 December 1987, claiming that he had a right to continued employment in his position as Programme Officer.

To substantiate this claim, the Applicant contends that:

(a) He had a legitimate expectation that his contract would be renewed;

(b) The decision not to extend his contract beyond 31 December 1987, was vitiated by lack of due process, prejudice, errors of law and of fact, and should therefore be rescinded.

IV. To support the first contention, the Applicant advanced a number of arguments, including his good performance record and the fact that the functions he performed were still required by the Organization. Hence, it was reasonable to expect, he asserts, that in normal circumstances, barring an explicit policy to the contrary, his contract would be renewed.

V. The Tribunal cannot concur with this conclusion. His appointment was governed by a letter of appointment signed by him on 3 October 1983. This letter provided, inter alia, that "the Fixed-Term Appointment does not carry any expectancy of renewal or of conversion to any other type of appointment in the United Nations University". The same provision was included in the letters of appointment granting successive extensions of his contract and is in full conformity with Staff Rule 104.12(b).

VI. The Applicant accepted his appointment, subject to the conditions specified in the letters of appointment and to those laid down in Staff Rule 109.7(a), which provides that "A temporary appointment for a fixed term shall expire automatically and without prior notice on the expiration date specified in the letter of appointment."

VII. In the light of the above, the Tribunal considers that the letters of appointment and the Staff Rules in force cannot be invoked in favour of the Applicant.

VIII. In this context, the Tribunal recalls its Judgement No. 422, Sawhney (1988), para. X, in which it stated:

> "...that a series of successive fixed-term appointments by itself is not enough to detract from the effect of Staff Rule 104.12(b), which stipulates that fixed-term appointments carry no right of renewal or conversion to any other type of appointment. Moreover, this provision was incorporated verbatim in each and every one of the Applicant's letters of appointment. According to Staff Rule 109.7(a), such appointments expire automatically and without prior notice."

IX. Moreover, in accordance with its jurisprudence, the Tribunal considers that good performance by itself is not enough to impose an obligation on the Respondent to extend the Applicant's appointment. (Cf. Judgements No. 205, El-Naggar (1975) and No. 422, Sawhney (1988)).

X. Notwithstanding the foregoing, the Tribunal has examined whether any legal expectancy for the extension of the Applicant's appointment could have arisen from the totality of circumstances surrounding his separation from service. In the present case, the Tribunal does not find that such a legal expectancy could be justified.

XI. However, the Applicant claims that the circumstances leading to the decision not to renew his contract were tainted with irregularity amounting to lack of due process, vitiating the contested decision. The Tribunal notes that the Applicant had difficulties with the Administration as early as 1985 and 1986, with regard to the renewal of his contracts, as well as with regard to the failure to extend his contract beyond 31 December 1987. The Tribunal found that on the expiration of the Applicant's initial two year fixed-term appointment in 1985, the facts and circumstances of the case reveal some extraordinary and disturbing elements; these show that the principles of good faith and due process were not fully reflected in the Administration's treatment of the Applicant.

XII. Thus, with regard to the renewal of the Applicant's contract in 1985, the Tribunal noted that:

The Appointment and Promotion Board (APB) recommended on 24 June 1985, the renewal of the Applicant's contract for only one year, while other appointments were routinely renewed for a two year period. The Tribunal

found that the APB recommendation for a one year appointment was based entirely on information provided by Mr. Edward Ploman, the Applicant's supervisor, that the Applicant was undecided about his own future (i.e. "working for UNU or returning to complete his studies").

The Applicant was unable at the time to rebut such information, which he contests, for the reason that the complete APB recommendation of 24 June 1985 was not brought to his attention.

In the Tribunal's view, such important information which may adversely affect the future of a staff member in UNU, should have prompted the APB to interview the Applicant, to try to ascertain from him, in an unmistakable way, his intentions in this regard, inasmuch as the APB in its recommendation noted the view of the Applicant's supervisor, that the Applicant was a competent and effective staff member.

XIII. When the question of the renewal of the Applicant's appointment was raised in 1986, Mr. Ploman, the Applicant's supervisor, in a memorandum to the Chief of Personnel, dated 24 April 1986, in which he generally praised the Applicant's qualities and performance, reiterated the issue of the uncertainty of the Applicant's future in UNU. He asserted that he had made it clear to the Applicant that he could not make a career at UNU and, therefore, he should prepare a plan for his future based on this consideration. Mr. Ploman recommended the extension of the Applicant's appointment for one year and the APB endorsed his recommendation.

XIV. This recommendation by the APB calls for a number of observations:

Firstly, the APB, again did not care to check with the Applicant what his intentions were regarding his future, although Mr. Ploman, in his memorandum of 24 April 1986, had practically invited him to leave UNU to make a career outside.

Secondly, the APB, in its recommendation dated 28 April 1986, on the strength of Mr. Ploman's recommendation, endorsed the renewal of the Applicant's appointment for a year from 3 October 1986, through 2 October 1987.

The Tribunal observes that the APB did something more: it volunteered to insert in the recommendation an ambiguously drafted notation stating the following:

> "If necessary, [Mr. B's] contract could be renewed until the end of the calendar year, i.e. December 1987 and the Board informed of such renewal, it being understood that this case could not be construed as having created a precedent."

This quotation, as it stands, while indicating a possibility for extension of the Applicant's contract for three months more, after the one year extension already granted, could also be construed as a hasty and premature intention, some 19 months ahead of time, not to renew the Applicant's appointment beyond 31 December 1987.

Although it is not clear how this remark, as quoted above, was inserted in the APB recommendation of 28 April 1986, or for what reasons, it appears that the Rector approved its content in May 1986, as part of the recommendation of the APB, and without raising any questions.

Thirdly, when the Applicant was informed on 22 May 1986 and on 16 July 1986 by the Chief of Personnel that his contract was extended for a further year, no hint whatsoever was given to the Applicant about this remark, leaving him under the impression that the renewal of his appointment for one year was simply a routine matter, while in fact it was not. In addition, as it will be shown later, this rather ambiguous and secretive remark, and not Mr. Ploman's contested memorandum of 28 December 1986, containing disparaging remarks about the Applicant and not officially before the APB, was instrumental in sealing the Applicant's fate in UNU.

XV. The issue of the renewal of the Applicant's appointment was brought before the APB session of May 1987. In considering the renewal of the Applicant's appointment, the APB found it sufficient to revive the remark included in its 28 April 1986 recommendation of the previous year, approved by the Rector in May 1986.

The APB, at its May session in 1987, simply recommended that this recommendation, ambiguous by itself, be maintained, and the Rector accepted it. Consequently, the Chief of Personnel advised the Applicant on 5 June

1987, that his contract would be renewed for three months more, from 3 October to 31 December 1987 and that he would be separated from UNU as from 31 December 1987.

XVI. In the Tribunal's view, this consideration by the APB of the renewal of the Applicant's appointment and the decision to separate him is susceptible to criticism on several grounds:

1. The APB consideration and the ensuing decision to separate him, were made exclusively on the sole basis of a prior recommendation, made a year earlier, as if the Applicant's work from April 1986, when this recommendation was first made, until the APB May session of 1987, was not relevant. The Applicant was deprived of any opportunity to have the Board evaluate his work in a fair, objective way. At the same time, the APB and the Administration did not seek a report of the supervisor on the Applicant's performance during that time and a recommendation from him on the extension or non-extension of the Applicant's appointment. It is true that a report by Mr. Ploman evaluating the Applicant's performance, with his views concerning renewal, was contained in a memorandum dated 28 December 1986, which curiously appeared on 22 May 1987, a week before the consideration by the APB of the Applicant's contract.

2. The sudden appearance of this report, unknown to the Applicant, prompted him to exercise his right of rebuttal and to request from the Chief of Personnel to adjourn the consideration of his case before the APB.

While the Chief of Personnel, in his answer of 20 May 1987, acceded to the Applicant's request not to place the memorandum of 28 December 1986 before the APB, he was silent on his other request for adjourning the case before the APB.

3. Nevertheless, the renewal of the Applicant's contract was brought before the APB on 22 May 1987. The APB adopted the recommendation to separate him on 31 December 1987, before the Applicant could submit his rebuttal.

XVII. The conduct of the Administration is open to a number of serious questions.

(1) From the file it appears that the Administration knew about the 28 December 1986 memorandum, but for unexplained reasons withheld it from the Applicant until about one week before the APB meeting in 1987.

(2) When the Applicant requested the Chief of Personnel for the exercise of his right to rebuttal, he was immediately granted the right, but he was not informed that the renewal of his appointment would be considered anyhow and could be rejected on the strength of the remark attached to the 28 April 1986 APB recommendation.

The Tribunal believes that the Administration, faced with such a communication, containing a negative assessment of the Applicant, should have waited for the result of the rebuttal, and properly submitted both before the APB.

XVIII. Furthermore, the Tribunal notes that certain events cast additional doubt on the handling of the 28 December 1986 memorandum.

1. It seems that Mr. Ploman attached great importance to this memorandum, having written it on 28 December 1986, three days before his retirement on 31 December 1986, when he already knew in April 1986 of the APB recommendation, indicating the Applicant's separation on 31 December 1987.

2. According to the record of the case, from September 1986, Mr. Ploman was away from Headquarters and therefore out of touch with the Applicant's performance during his absence. Since his last evaluation was made on 24 April 1986, it means that his evaluation of 28 December 1986, could cover only the months of May, June, July and August of 1986. The Tribunal finds it difficult to understand how in four months, the evaluation made in the memorandum of 28 December 1986, could depart so fundamentally from his assessment, on August 1986, of the Applicant's overall performance as "Very Good" in the evaluation report for the period of service from October 1983 to October 1985; as well as from his evaluations of 24 April 1986, 4 June 1985, or even at the time of the Applicant's recruitment on 31 May 1983.

XIX. In view of the foregoing, the Tribunal concludes that in the circumstances of the case, UNU did not fully respect the requirements of due

process and good faith in reaching its decision to separate the Applicant from service. The responsibility of the Respondent is thus engaged, entailing compensation for the injury sustained by the Applicant.

XX. With regard to the Applicant's claim that he was subjected to a number of work constraints while in UNU, the Tribunal notes that:

1. The Applicant, in order to substantiate his claim, mentioned several specific and obvious instances of work constraints.

2. The Respondent's answer to these specific examples of hardship was that even if these could be established, they could not now constitute the basis of substantive claims, nor would they prove discrimination against the Applicant.

Given the background of this case, the Tribunal would have expected a straightforward and categorical denial of these allegations. On the contrary, the Respondent contented himself in denying that the non-renewal was the direct result of the discriminatory treatment of the Applicant by Mr. Ploman, his former direct supervisor and the Rector of UNU.

The Tribunal considers that if the Applicant's case had been brought before the Panel on Discrimination and other Grievances (Panel on Discrimination), a thorough investigation could have been possible.

XXI. The Tribunal notes that the claim addressed by the Applicant to the Panel on Discrimination was not considered, because the Rector of UNU did not accept the Panel's jurisdiction in the case.

The Tribunal concurs with the Joint Appeals Board's (JAB) finding that it was unfortunate that the Panel on Discrimination was prevented from investigating the Applicant's case. Moreover, without speculating about the possible results of such investigation, the Tribunal considers that the Applicant was prevented from exercising the right to avail himself of a recourse open to all staff members. The terms of reference of the Panel on Discrimination are defined in Administrative Instruction ST/AI/308/Rev.1 of 25 November 1983. As U.N. officials, UNU staff members are entitled to enjoy access to such bodies as have been set up to protect staff members' rights and which are available to their colleagues elsewhere in the United Nations.

In the view of the Tribunal, the absence of a Panel on Discrimination at UNU deprives staff members of an important protection, unless they are allowed to refer their grievances to the Panel on Discrimination at U.N. Headquarters.

XXII. The Tribunal notes that at the time the Applicant submitted his claim to the U.N. Headquarters Panel on Discrimination, no such Panel was established at UNU and the refusal by the Administration to allow any investigation on the Applicant's allegations of unfair treatment constitutes a lack of due process.

The Applicant has requested the Tribunal to remand his case to the Panel on Discrimination. The Tribunal cannot entertain this request because the terms of reference of the Panel on Discrimination would seem to be limited to consideration of claims by staff members.

XXIII. The Tribunal is of the opinion that the JAB report on the request of the Applicant for the suspension of action, under Staff Rule 111.2(f), dated 3 January 1988, submitted by the JAB to the Secretary-General, contains an adequate recommendation and the request made to the Tribunal to modify that rule cannot be accepted within the terms of the Tribunal's competence.

XXIV. The Applicant has also requested the Tribunal to adjudge and clarify some aspects of a general legal and practical nature concerning the status of UNU and the extent of its autonomy. The Tribunal sees no need in this case to deal further with such questions.

XXV. The Tribunal notes that the Respondent agreed to pay to the Applicant compensation of one month's net base salary, which the Applicant did not accept.

XXVI. For the foregoing reasons, the Tribunal decides that the Applicant should be awarded compensation equivalent to three months of the Applicant's net base salary, at the level and step held by him at the time of his separation, for all the injury he has sustained.

XXVII. The Tribunal orders the Respondent:

(a) To pay to the Applicant three months of his net base salary at the level and step held by him at the time of his separation from service;

(b) To provide the Applicant with an appropriate certificate of service pursuant to Staff Rule 109.11;

(c) To incorporate a copy of this judgement in the Applicant's personnel files;

XVIII. The Applicant has requested that his "name not be used to identify the present case, so that, as has been done in a few other cases, the case be identified instead by a letter of the alphabet...". The Tribunal accepts the request and orders the case to be named Mr. B.

XIX. All other pleas are rejected.

(Signatures)

Ahmed OSMAN
Vice-President, presiding

Samar SEN
Member

Ioan VOICU
Member

New York, 8 November 1990

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/497
8 November 1990

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 497

Cases No. 491: SILVEIRA
No. 528: SILVEIRA

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, Vice-President, presiding; Mr. Arnold Kean; Mr. Ioan Voicu;

Whereas, on 30 November 1989, Celine Silveira, a staff member of the United Nations, filed an application in case No. 528, hereinafter referred to as the "first case", containing the following pleas:

"II. Pleas

(a) The preliminary relief requested below is requested again, including the request for production of documents that was never addressed by the Joint Appeals Board;

(b) Applicant requests rescission of the decisions implicit in: the failure to order further revision of her Performance Evaluation Report; the failure to enjoin the use of the fact sheet including reference to the rebuttal proceedings and the quotation from her harassing and biased supervisor (...); and the failure to restore the annual and sick leave charged to which Applicant has objected;

(c) Applicant invokes the Administration's obligation to use good faith efforts to transfer her to a post in an office which has no connection with the Office of Legal Affairs ('OLA') and provide her with fair and reasonable working conditions, including the opportunity for career development;

READEX FICHE best copy available

(d) Applicant seeks the following compensation:

(i) two years' net base salary in respect of the moral injury resulting from sexual harassment and administrative bias inflicted on her;

(ii) two years' net base salary in respect of the stress and stress-induced physical illness inflicted on her as a result of the above-described harassment and bias, the failure by the Secretary-General to fulfill the obligation he voluntarily and therefore, irreversibly, assumed to find her a position outside OLA and the Administration's persistence in resisting Applicant's legitimate claims against which there was clearly no meritorious defense; and

(iii) two years' net base salary in respect of the injury to Applicant resulting from the OLA's failure to recuse itself because of the conflict of interest inherent in its position as Applicant's employer department and as counsel to the Secretary-General with a duty to inform him that no basis for a defense existed even though such would embarrass that office as the employing department;

(e) Referral of Applicant's claim for sick leave in February and March 1988 and November 1988 to an independent practitioner or medical board; and

(f) Such other relief, including monetary compensation, as the Tribunal deems appropriate in view of the exceptional nature of the case."

Whereas the Respondent filed his answer on 15 February 1990;

Whereas the Applicant filed written observations on 22 March 1990;

Whereas the application in the "first case" contained a request for oral proceedings;

Whereas, on 21 March 1990, the Applicant filed a new application in Case No. 491, hereinafter referred to as the "second case", in which she requested, under article 12 of the Statute of the Tribunal,

a revision of Judgement No. 458 rendered in her case on 7 November 1989;

Whereas the application in the "second case" contained a request for oral proceedings;

Whereas the Respondent filed his answer on 20 April 1990;

Whereas the Applicant filed written observations on 28 June 1990;

Whereas the facts in the "second case" were set out in Judgement No. 458;

Whereas, on 20 September 1990, the Presiding member of the Tribunal ruled that no oral proceedings would be held in these cases.

Whereas the facts in the "first case" are as follows:

The Applicant's temporary assignment with the UNCTAD Liaison Office in New York was due to expire on 31 October 1988. Accordingly, on 23 September 1988, the Recruitment and Placement Officer, General Service Staffing Section, Office of Human Resources Management (OHRM), had informed the Applicant that she should report to the Executive Officer of the Office of Legal Affairs (OLA) on 1 November 1988, "for assignment within that Office" while efforts to place her elsewhere continued. In a reply dated 4 October 1988, the Applicant objected to her transfer, "for health reasons and because of the hostile work environment" at OLA, arguing that the Organization had "an ethical responsibility" to place her in a different Department.

On 7 October 1988, the Under-Secretary-General for Administration and Management informed the Applicant that the Secretary-General had decided to maintain the Legal Counsel's appraisal of the report by a Rebuttal Panel which had, in accordance with Administrative Instruction ST/AI/240/Rev.2, examined the substance of her rebuttal to the performance evaluation report dated 12 January 1987, assessing her performance at the General Legal Division, OLA. He also informed her that he would continue to make "every effort to effect [her] transfer or reassignment to a post outside the Office of Legal Affairs".

On 20 October 1988, the Executive Officer, OLA, asked the Assistant Secretary-General, OHRM, to assign the Applicant "to some other post outside OLA until a permanent arrangement [could] be found for her", since the Applicant's "presence in the Office would be disruptive to other staff ...". He also asked the Assistant Secretary-General to annul the memorandum of 23 September 1988, requesting the Applicant to report to OLA. It appears from the record of the case that no action was taken on this request.

On 31 October 1988, the Chief, General Service Staffing Section, OHRM, circulated the Applicant's "fact sheet", which contained a summary of her personnel record, including a referral to the rebuttal proceedings and quotations from her supervisor's remarks in the contested report, to 16 Departments and Offices and inquired whether they would consider the Applicant for any vacant G-4 position.

The Applicant did not report to work at OLA on 1 November 1988.

In a certified letter dated 4 November 1988, the Executive Officer, OLA, informed the Applicant that while OHRM continued to make efforts to place her outside OLA, she was obliged to report for duty to OLA. He notified her that her annual leave balance as of 31 October 1988 was "minus seven days" and reminded her that any absence which was not fully justified by her, would "be considered as unauthorized" and constituted "a non-compensable period in accordance with paragraph 10 of Annex I of the Staff Rules".

In a letter dated 15 November 1988, the Applicant's holistic chiropractor advised the Applicant's counsel that the Applicant, who was under his care, suffered from a "stress disorder", which, in his view, had been precipitated by her experiences at work "in particular, the Office of Legal Affairs ... therefore, requiring a change in her work environment".

According to the Applicant's personnel file, efforts made by the Respondent to transfer the Applicant to another Department were unsuccessful.

On 28 November 1988, the Executive Officer, OLA, wrote to the Applicant to inform her that her counsel's letter, together with the

letter from her holistic chiropractor, had been sent to the Director of the Medical and Employee Assistance Division, OHRM, (the U.N. Medical Director) who believed that although it was "still inadvisable for [her] to work in the Office of Legal Affairs on the 34th floor...", he saw "no objection to her working in the Office of Legal Affairs elsewhere (eg. on the 32nd floor)". Accordingly, it had been decided to assign her temporarily to the Treaty Section, OLA, which was located on the 32nd floor, two floors removed from the General Legal Division where she had previously worked. In addition, the Executive Officer notified her that since she had not reported to work since 31 October 1988, he had requested the Payroll Unit of the Accounts Division to withhold payment of her salary as of 16 November 1988.

On 6 December 1988, the Applicant's holistic chiropractor wrote to the U.N. Medical Director, stating that in his opinion, such an assignment would not "eliminate" contacts with the then Director of the General Legal Division, who could still be "in a position to control [the Applicant's] career ... more importantly, there would inevitably be associations which would trigger the stress disorder" which was afflicting her. On 7 December 1988, the Applicant wrote to the U.N. Medical Director, enclosing the letter from her holistic chiropractor, as well as a letter from a neurologist, attesting that she had a "job-related anxiety/stress disorder" and urging that she should be transferred to another Department. In a reply dated 8 December 1988, the U.N. Medical Director informed the Applicant that he did "not believe there [were] sufficient medical reasons" to prevent her from taking up her "<u>temporary</u> assignment in the Treaty Section (on the <u>32nd floor</u>)".

On 12 December 1988, the U.N. Medical Director informed the Executive Officer, OLA, that "in a spirit of compromise, and considering all the factors involved", he considered that half of the Applicant's absence from work during the period 1 November - 2 December 1988, could be "treated as certified sick leave". On 15 December 1988, the Executive Officer, OLA, informed the Applicant that, in accordance with the U.N. Medical Director's instructions, he

would treat half of the period running from 1 November - 2 December 1988, as certified sick leave and advised her in detail of the current status of her annual and sick leave.

On 16 November 1988, the Applicant requested the Secretary-General to review the administrative decision to submit her fact sheet, containing a reference to the rebuttal of her performance report, to different Departments and Offices. On 20 December 1988, she asked the Secretary-General for his consent to submission of her appeal directly to the Tribunal.

In a memorandum dated 22 December 1988, the Executive Officer, OLA, wrote to the Applicant concerning her allegations of sexual harassment against the then Director of the General Legal Division, and her refusal to work for the Chief of the Treaty Section. He also informed her that "although the General Service Staffing Section [had] sent out a letter to all Offices and Departments requesting offers of a post for [her], no one ... replied in the affirmative" thus rendering it "impossible to effect an ad hoc transfer to another Office or Department at this time".

Having received no reply from the Secretary-General to her letter requesting review, on 16 January 1989, the Applicant lodged an appeal with the Joint Appeals Board (JAB) against the decision of 4 November 1988, requesting the Applicant to report for duty at OLA and the circulation of her "fact sheet" to the 16 Departments and Offices requested to consider her for possible assignment to them. On 5 April 1989, the Applicant requested the Secretary-General to review the administrative decision of 15 December 1988, to withhold 17 days pay from her January 1989 pay check and the decision to deny her sick leave for her "job-related anxiety/stress disorder". The Board consolidated both appeals and adopted its report on 1 August 1989. Its conclusions and recommendation read as follows:

"Conclusions and Recommendation

34. The Panel could not find any merit in the appeals. The appeals as a whole were considered to be frivolous.

35. Accordingly, the Panel could not agree to any one of the five reliefs requested ranging from the request for restoration of leave to promotion and financial compensation.

36. The Panel recommended that a fresh effort be made by both the Administration and the appellant to find a solution to this case.

37. The Panel makes no further recommendation in favour of the appeal."

On 1 September 1989, the Acting Under-Secretary-General for Administration and Management informed the Applicant that the Secretary-General had re-examined her case in light of the Board's report and had decided to maintain the contested decisions. He also noted the Board's unanimous recommendation that "a fresh effort be made by both the Administration and the appellant to find a solution to this case". On 30 November 1989, the Applicant filed with the Tribunal the application referred to above in the "first case".

In a letter dated 4 December 1989, the Assistant Secretary-General, OHRM, advised the Applicant that the post encumbered by her since December 1988 at the Treaty Section was slated to be abolished by 31 December 1989. Accordingly her name had been placed "on a list of staff to receive priority placement under the vacancy management and staff redeployment system". In a further letter dated 7 December 1989, the Assistant Secretary-General, OHRM, informed the Applicant of the procedures being followed by the Administration to place staff whose posts were being abolished. The Applicant currently encumbers a post in the Treaty Section. On 21 March 1990, the Applicant filed with the Tribunal the application referred to above in the "second case".

Whereas the Applicant's principal contentions in the first and second cases are:

1. In its review of the Applicant's appeal, the JAB made several errors which vitiate its conclusions.

2. The JAB has failed to fully exercise its jurisdiction in considering the Applicant's appeals frivolous.

3. The Respondent did not make good faith efforts to place the Applicant outside OLA.

4. The Respondent charged sick leave as annual leave and consequently the Applicant received less than her full emoluments.

5. The new decision by the Respondent to abolish the Applicant's post is vitiated by lack of due process and constitutes additional evidence of the operation of extraneous factors in administrative decisions affecting the Applicant's career.

6. The Applicant suffered injury because of unfair treatment and lack of good faith by the Respondent.

Whereas the Respondent's principal contentions are:

1. Limitations on receivability of appeals is a characteristic of all judicial systems. Article 7.3 of the Statute of the Tribunal ensures that the Tribunal does not have to consider frivolous claims. Such a limitation does not violate the rights of staff members.

2. The failure of the Applicant to be placed is a consequence of her own behaviour in making baseless allegations. That behaviour makes it highly improbable that any Department would willingly offer her a position.

3. The Applicant's claims for sick leave have been finally determined in accordance with an appeal procedure of her own choosing. The history of this case discloses no reasons to permit the same claims to be re-opened by a different procedure.

4. The application for revision of Judgement No. 458 is not timely made and the facts relied upon by the Applicant do not constitute a "decisive factor" within the meaning of Article 12 of the Tribunal's Statute, to justify revision of Judgement No. 458.

The Tribunal, having deliberated from 16 October to 8 November 1990, now pronounces the following judgement:

I. Since the applications submitted in Cases No. 491 and No. 528 are related, the Tribunal orders the joinder of the two cases.

II. In the application submitted in Case No. 491, the Applicant seeks revision of Judgement No. 458 dated 7 November 1989. The Applicant alleges discovery of facts of a decisive nature within the meaning of article 12 of the Tribunal's Statute. The facts are a letter of 4 December 1989, to the Applicant from the Assistant Secretary-General for Human Resources Management (OHRM), advising her that her post was going to be abolished, and a further letter of 7 December 1989, from the Assistant Secretary-General, OHPM, advising the Applicant that every effort would be made to find her an alternative post. The Applicant argues that these new facts are decisive because they establish unfair treatment and prejudice.

III. The Tribunal recalls that the revision of a judgement is governed by article 12 of the Tribunal's Statute.

IV. It is the view of the Tribunal that article 12, which provides inter alia that "the application must be made within thirty days of the discovery of the fact and within one year of the date of the judgement" is clearly mandatory. Accordingly, any application for revision of a judgement must be made "within thirty days of the discovery of the fact" relied upon. In the present case, the Applicant relies on letters dated 4 and 7 December 1989, which were plainly known to the Applicant more than thirty days before 21 March 1990, the date on which the application was filed. Consequently, the Tribunal finds that the application is not receivable. Contrary to the Applicant's contention, the thirty day period is not enlarged by the fact that the Applicant sought to have the Committee on Applications for Review of Administrative Tribunal Judgements act with respect to Judgement No. 458.

V. In the application submitted in Case No. 528, the substantive issues are whether use of a "fact sheet" to circulate the candidature of the Applicant for vacant posts violated her rights, and whether efforts were made in good faith to transfer her to another department. A subsidiary issue is whether the Applicant's claim to sick leave was

properly denied. However, the decisive issue is procedural, i.e. whether the application is receivable, since the Joint Appeals Board (JAB), after considering in detail the Applicant's contentions, unanimously found the Applicant's appeals, as a whole, to be frivolous.

VI. Paragraph 3 of article 7 of the Tribunal's Statute provides that "In the event that the recommendations made by the joint body and accepted by the Secretary-General are unfavourable to the applicant, and in so far as this is the case, the application shall be receivable, unless the joint body unanimously considers that it is frivolous".

VII. Nevertheless, the Tribunal has ruled in Judgement No. 269, Bartel (1981), para. III, that "... even where the joint body unanimously concluded that an appeal was frivolous, the Tribunal is not precluded from considering whether the joint body's conclusion was vitiated by some irregularity". The Applicant alleges that the JAB's conclusion of frivolousness is vitiated by irregularity because cases involving recourse and revision of performance evaluation reports have been considered by JABs, the Tribunal, and the International Court of Justice. The Tribunal finds no merit in this contention. The issue before the JAB was not whether revision of a performance evaluation report may be the proper subject of an appeal. It was whether the appeals in question, based on unsupported and unjustified assertions of bias and harassment, were frivolous. After examining this issue, the Tribunal finds that the conclusions of the JAB were not vitiated by any irregularity.

VIII. The Applicant contends that consolidation of her two appeals is an irregularity. The Tribunal disagrees. Under the applicable Staff Rule 111.1(e), a JAB may establish its own procedures. Joinder of multiple appeals is a permissible procedural technique, which the Tribunal itself has utilized.

IX. The Applicant claims that, because an answer by the Respondent cannot be declared frivolous, the concept of equality between parties requires that a JAB should not declare an application frivolous. The Tribunal finds no valid basis for this contention. Article 7.3 of the Tribunal's Statute provides for the declaration that an application is frivolous as a proper mechanism for preventing abuse of the appellate procedure by vexatious applicants.

X. The Applicant alleges irregularity on the part of the JAB in a supposed misstatement of fact. The misstatement alleged is not considered by the Tribunal to be a misstatement at all. The reference by the JAB to the "decision", is to the Legal Counsel's decision, of 10 December 1987, following his appraisal of the report of the Rebuttal Panel established to review the Applicant's performance evaluation report. It is quite clear from the JAB report that the JAB was aware of the correct dates of the Applicant's temporary assignments.

XI. Another claim of the Applicant is that the JAB's finding of frivolousness was irregular because it was proper for her to proceed before the JAB if the Administration was not implementing a Tribunal judgement. The Tribunal finds no merit in this claim. The issue is not whether the JAB was a proper body to consider the appeals. The real question is whether the JAB could properly have considered the appeals frivolous. In this regard, there is no evidence that the JAB's finding was vitiated by any irregularity, particularly since no proof was ever offered to support the attacks and accusations made by the Applicant on her colleagues.

XII. The Applicant also claims an irregularity since, in recommending rejection of her appeal against denial of her sick leave claim, the JAB referred to Judgement No. 422, Sawhney (1988). The Tribunal finds no irregularity here. The JAB properly mentioned that judgement in dealing with the Applicant's claimed entitlements to sick leave. That

the JAB cited that case did not affect in any irregular manner its conclusion that her appeals, as a whole, were frivolous.

XIII. The Applicant finally claims that it is improper for the JAB to find an appeal frivolous, since the result of such a finding is to deny her the right to be represented before the Tribunal by outside counsel. The argument is that, since outside counsel are not permitted to appear at JAB hearings, the finding of frivolousness blocks the Applicant's access to the Tribunal, and therefore prevents her from being represented on the merits by outside counsel before the Tribunal. This argument cannot be sustained. There is no due process requirement that forecloses the Tribunal from depriving a frivolous Applicant of access to the Tribunal. Any lack of access to outside counsel which the Applicant might suffer is a consequence of her filing frivolous appeals to the JAB.

XIV. At the same time, the Tribunal observes that the Applicant was able to appeal, and has appealed, to the Tribunal with the assistance of outside counsel with respect to the claim that the JAB conclusion of frivolousness was vitiated by irregularity.

XV. In the light of the above considerations, the Tribunal finds that the JAB's conclusions were not vitiated by any irregularity. Accordingly, the Tribunal holds that it has no jurisdiction to review the appeal on its merits. Moreover, the Tribunal observes that the application attempts to re-argue issues already decided by Judgement No. 458, Silveira (1989) and which are res judicata. The Tribunal considers this improper, and an abuse of its procedures.

XVI. In conformity with Judgement No. 458, the Tribunal reiterates its hope that the efforts to effect the Applicant's transfer or re-assignment to a post outside the Office of Legal Affairs, in accordance with medical advice received, will continue to be pursued.

XVII. For the foregoing reasons, the applications in Cases No. 491 and No. 528 are rejected in their entirety.

(Signatures)

Jerome ACKERMAN
Vice-President, presiding

Arnold KEAN
Member

Ioan VOICU
Member

New York, 8 November 1990

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/498
8 November 1990

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 498

Case No. 504: ZINNA

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, Vice-President, presiding; Mr. Samar Sen; Mr. Arnold Kean;

Whereas, at the request of Eduardo Zinna, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended to 30 September and 30 December 1988 and 31 March 1989, the time-limit for the filing of an application to the Tribunal;

Whereas, on 31 March 1989, the Applicant filed an application, containing the following pleas:

"II. PLEAS

The Applicant respectfully requests the Tribunal to order the following measures:

(a) To declare itself competent to hear the Applicant's case in first instance and accordingly to invite the Applicant to submit a full statement concerning the substance of his application;

(b) Alternatively, to order the case remanded for institution of the required procedure and, in particular, to order the Joint Appeals Board to consider his appeal on its merits; and

(c) In either case, to order the Respondent to pay the Applicant the equivalent of three months'

net base salary as compensation for the loss caused the latter by the procedural delay resulting from the Respondent's failure to protect the Applicant's rights under Staff Regulation 11.1 and other pertinent regulations and rules."

Whereas the Respondent filed his answer on 22 September 1989;

Whereas, on 5 January 1990, the Applicant requested the Tribunal to order the production by the Respondent of two documents concerning his case;

Whereas the Applicant filed written observations on 30 March 1990;

Whereas the Applicant submitted an additional document on 27 July 1990;

Whereas the facts in the case are as follows:

Eduardo Zinna, a national of Argentina, entered the service of the United Nations on 11 October 1969, as a Translator Trainee at the Department of Conference Services. He served initially on a probationary appointment at the P-2, Step I level, and then from 1 October 1971, on a permanent appointment as a Translator at the P-3 level.

On 26 November 1973, the Liaison Officer for the United Nations Environment Programme (UNEP) sought the Office of Personnel Services' (OPS) assistance in transfering the Applicant to the UNEP Liaison Office at Headquarters, as Assistant Liaison Officer, a post at the P-4 level. After interviewing the Applicant, in a memorandum dated 3 December 1973, a Senior Personnel Officer, OPS, recommended to the Chief of Staff Services, OPS, against the Applicant's transfer, "in view of [the Applicant's] nationality and relative merit" and only in the event there were "no other better qualified candidates". In a note dated 10 December 1973, Mr. Victor Elissejev, who at the time exercised the functions of Deputy Chief of Staff Services, OPS, recommended that UNEP's request for the Applicant's transfer be denied, on the ground that the number of nationals of Argentina

employed in the Secretariat "exceed[ed] the upper limit of the geographical quota (17)" and consequently, "[the Applicant's] transfer from a non-geographical to a geographical post [would] further aggravate the over-representation of [Argentina] in the Secretariat".

The memorandum of 3 December 1973, from the Senior Personnel Officer, OPS, to the Chief of Staff Services, OPS, containing Mr. Elissejev's recommendation, was filed in the Applicant's confidential personnel file and was never shown to him.

On 13 December 1973, the Chief of Staff Services, OPS, proposed to the UNEP Liaison Officer two further candidates for the UNEP post, noting that OPS was "not certain that [the Applicant was] particularly qualified for such an assignment ..." in view of his "lack of relevant experience and of his relatively short service with the UN ...". The Applicant was not transferred to UNEP.

On 3 June 1974, the Applicant was transferred to the Department for Political Affairs, Trusteeship and Decolonization as a Political Affairs Officer and on 1 August 1977, to the Division for Policy Co-ordination, Planning and Information Section, OPS. On 1 April 1978, he was promoted to the P-4 level.

On 1 January 1981, the Applicant's functional title was changed to Acting Chief, Planning and Information Section, Division for Policy Co-ordination. At the time, Mr. Victor Elissejev was Acting Director of that Division.

On 28 April 1982, the then Assistant Secretary-General for Personnel Services announced to the staff in Information Circular ST/IC/82/23, the 1982 Senior Officer (P-5) Promotion Register, containing the names of staff at the P-4 level, whose inclusion in the Register, the Secretary-General had approved, upon the recommendation of the Appointment and Promotion Board. The Applicant's name was not included therein. On 24 May 1982, he instituted a recourse procedure before the Board, but was unsuccessful in this regard.

On 16 November 1982, the Applicant wrote to the former Assistant Secretary-General for Personnel Services, asking him why he had not endorsed a recommendation by his Director to promote him to the P-5 level, during the 1982 Promotion Review Exercise. The Applicant argued that since he had never worked directly for the Assistant Secretary-General, he was "inclined to feel that motives extraneous to [the Applicant's] performance may have influenced [the Assistant Secretary-General's] decision". In a reply dated 24 November 1982, the former Assistant Secretary-General for Personnel Services explained that at a meeting of all Directors of his former office, when recommendations from all Sections were discussed, objections had been made to the recommendation by the Applicant's Director to promote the Applicant on an accelerated basis, in view of the fact that "no concrete evidence was given that [his] performance was exceptional enough to warrant a recommendation for accelerated promotion". Accordingly, the Assistant Secretary-General had supported "the collegial decision not to recommend [the Applicant] on an accelerated basis". The Applicant was subsequently promoted to the P-5 level in connection with the 1983 Promotion Review Exercise.

On 22 August 1984, the Applicant asked the Chief, Personnel Records Unit, OPS, to make the necessary arrangements to examine his personnel file, noting that he had "never before taken advantage of the possibility of inspecting the declassified confidential file". The Applicant contends that when he examined his file, he saw for the first time the memorandum of 3 December 1973, containing Mr. Elissejev's note objecting to his transfer to UNEP, as well as the exchange of correspondence with the former Assistant Secretary-General, OPS, concerning his promotion. On 11 July 1985, he wrote to the Director, Division of Personnel Administration (DPA), asking that the exchange of correspondence between himself and the former Assistant Secretary-General, OPS, be removed from his official status file. In a reply dated 18 July 1985, the Director, DPA, rejected the

Applicant's request on the ground that the exchange of correspondence relating to his promotion, as well as memoranda relating to applications for different posts, were considered "to be of an official nature" and even assuming they were "marked 'confidential'", after the abolition of confidential files, were now placed in official status files.

On 3 June 1986, the Applicant wrote to the then Assistant Secretary-General for Personnel Services, asking him to "restore [his] reputation and career to what they would have been without Mr. Elissejev's direct and damaging interventions..." to disrupt his career. In a further communication dated 22 August 1986, to the then Assistant Secretary-General for Personnel Services, the Applicant expressed his "objections to the designation of ... as Officer-in-Charge of the Division for Policy Co-ordination during the absence of the Director and Deputy Director". He argued that "to jump ... over [his] head on a regular basis [was] yet another act of petty discrimination designed further to harm [his] professional reputation and prejudice [his] future career". He further stated that "Mr. Elissejev's pattern of behaviour, seen in the light of past prejudice, as proved by evidence already submitted, [showed] clearly the existence of present, continuous and harmful discrimination and warrant[ed] immediate and decisive action by the Office of Personnel Services". On the same date, the Applicant wrote to the Secretary-General, requesting review, under Chapter XI of the Staff Rules, of the "specific actions and decisions" referred in his letters of 3 June and 22 August 1986 and the "general violation of [his] terms of appointment" resulting from "actual, continuous and present discrimination against [him] by ... Mr. Victor F. Elissejev". The Applicant also asked for direct submission of his appeal to the Tribunal. In a reply dated 9 December 1986, the then Under-Secretary-General for Administration and Management informed the Applicant that since he had not challenged any particular administrative decision, he could not conduct the administrative review envisaged by Staff

Rule 111.2(a) and since he had "not stated a cause of action within the terms of Staff Regulation 11.1 and Staff Rule 111.2", his request for direct submission of his appeal to the Tribunal could not be entertained. On 21 November 1986, the Applicant lodged an appeal with the Joint Appeals Board (JAB) requesting the Board to endorse his request to submit the case directly to the Administrative Tribunal. On 22 January 1987, the Applicant submitted a supplementary statement of appeal to the JAB. The Board adopted its report on 19 November 1987. Its considerations, conclusion and decision read as follows:

"Considerations

7. The Panel noted that the appellant has not indicated in all his submissions to the Board a specific cause of action against which he is appealing within the context of Staff Regulation 11.1 and Staff Rule 111.2. It was arguable whether any of the instances of administrative action or inaction mentioned by the appellant could reasonably be construed to be administrative decisions within the meaning of Staff Rule 111.2.

8. In the Panel's view the expression 'administrative decision' in the context of Staff Regulation 11.1 refers specifically to a decision on an action taken by the Administration which violates the terms and conditions of a staff member's 'appointment including all pertinent regulations and rules' in force, or which amounts to the non-observance of the said terms of appointment, including all the relevant regulations and rules in force at the time of the alleged non-observance. In the Panel's opinion, contentions (a), (b) and (c) quoted by the appellant, i.e. unsubstantiated allegations of discriminatory treatment on grounds of nationality in 1973, lack of his supervisor's support in 1981 and 1982 and harassment in 1981 through 1986, could not reasonably be construed as decisions or actions for the purposes of Staff Regulation 11.1 and could not be entertained by the Panel. Contention (d), namely the appellant's request to remove harmful material from his official status file is likewise not receivable before the Panel, having taken place four years prior to the appellant's initiation of the appeals process under Staff Rule 111.2.

Conclusion and decision

9. Accordingly, pursuant to its Staff Rule 111.2(j) mandate, the Panel decides that it is not competent to entertain this appeal since contentions (a), (b) and (c) do not relate to a specific cause of action appealable under that rule and contention (d) is time-barred and consequently not receivable by the Panel."

On 9 March 1988, the Under-Secretary-General for Administration and Management informed the Applicant that the Secretary-General had taken note of the Board's decision, taken under paragraphs (e) and (j) of Staff Rule 111.2 not to entertain his appeal. He added:

"... Notwithstanding the Board's authority under Staff Rule 111.2 to decide on its competence and to waive the time-limits under Staff Rule 111.2(a) and (b), in exceptional circumstances, the Secretary-General has decided, in an attempt to settle your case and to resolve the matter satisfactorily:

(a) to remove from your official status file the referred letter of 24 November 1982, containing adverse material in personnel records, and

(b) to monitor carefully your career in the Organization to ensure that it is not prejudiced by the events that gave rise to this proceeding and that you receive the fair treatment to which you are entitled.

In this connection, I should like to assure you that you will be duly considered for any career opportunity that may arise pursuant to the relevant rules and procedures."

On 31 March 1989, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The decision to refuse to effect the Applicant's transfer to UNEP in 1973 was based exclusively on the Applicant's

nationality and thus constituted an act of discrimination, in violation of the Charter.

2. The Applicant's subsequent career was prejudiced and harmed by further acts of discrimination and harassment by the same official who had recommended against his transfer in 1973 and who became the Applicant's supervisor in 1982.

3. A number of actions by the Respondent constitute administrative decisions and the JAB should have entertained the appeal.

Whereas the Respondent's principal contentions are:

1. The JAB correctly decided that it was not competent to entertain the Applicant's contentions.

2. The JAB correctly decided that part of the appeal was time-barred.

3. The Applicant's claim for financial compensation for procedural delay is not well-founded.

The Tribunal, having deliberated from 17 October to 8 November 1990, now pronounces the following judgement:

I. Early in his application, the Applicant states that he proposes "to limit his exposition ... to those facts which appear essential to determine the question of receivability". There are several references to what he describes as "substantial" issues coupled with numerous offers to produce detailed evidence, should the Tribunal decide to examine the case on its merits. However, all the facts and arguments presented to the Tribunal by both the Applicant and the Respondent are adequate, in the view of the Tribunal, to assess the basic problem raised by the Applicant and to pronounce upon it.

II. The Applicant wished that a memorandum of 3 February 1988 from the Legal Counsel to the Under-Secretary-General for Administration and Management, together with a copy of the

Under-Secretary-General's response, should be produced by the Respondent for examination by the Tribunal, but the Respondent pleaded that these documents were privileged, and declined to supply them. There is no need in this case to pass on the question of privileged documents. The Tribunal denies the Applicant's request since it considers that the documents requested could not add to or detract from the issues before it, even if they contained material which ran counter to some of the arguments now advanced by the Respondent.

III. Similarly, the various legal opinions cited by the Applicant are of little assistance in the disposal of the question of receivability. This issue has to be determined by the provisions of article 7 of the Tribunal's Statute. The Applicant exhorts the Tribunal to interpret its power widely rather than narrowly, but the Tribunal cannot broaden its interpretation to a point where the basic concepts of its Statute are changed.

IV. In essence, the Applicant pleads that he has been a victim of long, elaborate and continuous discrimination and prejudice, and as a result, has been denied promotion and subjected to humiliation and distress of one kind or another. Thus, he cites the refusal of the Office of Personnel Services (OPS) to release him for service in 1973 with the United Nations Environment Programme (UNEP), the refusal by his supervisors to recommend him for promotion, the lack of adequate support and assistance in his daily work, and finally the appointment, for five days, of a staff member junior to him to be in charge of the Division for Policy Co-ordination, OPS, when Mr. Victor Elissejev, its Director, proceeded on home leave, as examples forming a pattern of systematic invidious discrimination. The resulting alleged injury to the Applicant's interests and legal rights is the basis for the relief he considers himself entitled to.

V. The Tribunal has examined all these allegations and concluded that none of them can be treated as an administrative decision within the meaning of the Tribunal's Statute. However widely article 7 of the Tribunal's Statute may be interpreted, the Tribunal's main focus should be on the undesirability of having old, sometimes very old, claims presented either to a Joint Appeals Board (JAB) or to the Tribunal. No justification can be found for an Applicant, who thinks he is being victimized, to wait for years and years before resorting to the proper procedural steps. The Tribunal made this point in Judgement No. 475, Martorano (1990). In the Tribunal's view, the various time-limits provided in the Staff Rules are to ensure that remedies are sought from contested administrative decisions in a timely and proper manner.

VI. When, on 22 August 1986, the Applicant wrote to the Assistant Secretary-General, OPS, about his grievances, he received a reply which stated, inter alia:

> "Since you have not challenged any particular administrative decision, it is not possible to conduct the administrative review envisaged by Staff Rule 111.2(a)".

Similarly, when the JAB Secretariat pointed out that no administrative decision had been identified against which an appeal could have been lodged, the Applicant repeated his general complaint of discrimination, and could do no better than state that his colleague, with less seniority, being put in charge of the office for five days was the "specific cause for action". Apart from the very minor nature of this complaint and the Applicant's own realization "that this decision, if taken by itself, might fail to convey the extent of the injury to his reputation and career suffered by the Applicant", the fact remains that in day-to-day management, the Staff Regulations and Rules empower the Secretary-General to make such arrangements as he considers appropriate.

VII. The main thrust of the Applicant's complaint is that he has been subjected to discrimination over the years (since 1973) leading to various setbacks and irritations, but he has failed to give any reason why anyone should adopt a discriminatory and prejudiced attitude towards him - even on the part of Mr. Victor Elissejev who, in 1986 was the Director of the Division for Policy Co-ordination, OPS, and the Applicant's supervisor most of the time, and who, the Applicant alleges has been vehemently and systematically opposed to him .

VIII. The Applicant's failure to be inducted to UNEP at the P-4 level, which he expected, when he had been a staff member at the P-3 level for about two years was, he alleges, due to Mr. Elissejev's casual or even cavalier attitude about the Applicant's suitability for the new job, but the record shows that the reluctance of OPS to release him for the new job could have been for a number of different reasons. In this context, the Applicant questions the criterion of geographical distribution cited by several officials, and states that the principle is "applicable only to the recruitment of staff and is therefore not relevant to the transfer or promotion of staff members already in service". However, in this instance, the question was of a staff member moving from a post that was not subject to geographical distribution to a post that was. In any event, the Applicant knew of the denial of OPS to release him for UNEP, and there is nothing to show that he sought or questioned such reasons as may have prompted the decision of OPS. On the other hand, the evidence shows that despite the Applicant's utter dissatisfaction with Mr. Elissejev's attitude, he did in fact, as the Applicant himself states, recommend the Applicant for promotion, which, however, was denied on recourse to the Appointment and Promotion Board.

IX. The Applicant states, at different stages, that he had exhausted all avenues of relief before filing his appeal to the

JAB and then to the Tribunal. Yet, as late as 30 March 1990, in response to the Respondent's argument, he states that he could have taken his complaints to the Panel on Discrimination and Other Grievances (the Panel on Discrimination) and recognizes that these two avenues, the Panel on Discrimination and the JAB, open to staff members, are not mutually exclusive. Not only did the Applicant fail to go to the Panel on Discrimination, he omitted to respond to the letter dated 24 November 1982 from Mr. James Jonah, who was the former Assistant Secretary-General for Personnel Services and who took "strong exception to the unwarranted remark" made by the Applicant.

X. The Tribunal also notes that the Applicant wished to make a direct reference to the Tribunal rather than proceed through the JAB as he felt that "the role played in the present case by the Office of Personnel Services and the Division for Policy Co-ordination might involve a conflict of interest". The implication of this attitude is far from justified. The JAB, being an advisory body to the Respondent, could always be open to an accusation, however unjust, that it was liable to be influenced by the Administration. Yet it is the recognized and accepted channel through which appeals against administrative decisions are to be considered before they can come to the Tribunal. In any event, despite his reservation, when the Applicant's request for direct reference to the Tribunal was refused, he did, in fact, go the the JAB.

XI. Meanwhile, the Respondent has removed from the Applicant's personnel file the letter of 24 November 1982, which the Applicant claims was included in his record at the instance of Mr. Elissejev, and the Respondent has undertaken "to monitor carefully [his] career in the Organization to ensure that it is not prejudiced by the events that [gave] rise to this proceeding and that [he] receive[s] the fair treatment to which [he is] entitled". There is a further assurance that "[he] will be duly

considered for any career opportunity that may arise pursuant to the relevant rules and procedures". Nonetheless, the Applicant complained, as late as 27 July 1990, that he had been shunted to some non-existent or inconsequential duties. The Applicant suspects that this has been done out of the Respondent's dissatisfaction with the Applicant for having invoked the help of the Tribunal. A forum for such a grievance, can be, in the opinion of the Tribunal, the Panel on Discrimination.

XII. In view of all these considerations, and particularly in the absence of any appeal made before the JAB against any specific administrative decision within the time-limits prescribed in the relevant Staff Rules, the Tribunal cannot conclude that the JAB acted erroneously or illegally in any manner. The Tribunal cannot therefore remand the case to the JAB. under article 9, para. 2 of its Statute, and far less adjudicate it under article 7 of its Statute.

XIII. Accordingly, the application is rejected in its entirety.

(Signatures)

Jerome ACKERMAN
Vice-President, presiding

Samar SEN
Member

Arnold KEAN
Member

New York, 8 November 1990

R. Maria VICIEN-MILBURN
Executive Secretary